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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

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## No. 269

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AILEEN E. MITCHELL (SUCCESSOR OF C. MINKWITZ, FORMER TREASURER OF FORT BEND COUNTY, TEXAS), AS TREASURER OF FORT BEND COUNTY, TEXAS, ET AL.,
PETITIONERS,

*vs.*

J. W. HAMPEL ET AL., TRUSTEES IN BANKRUPTCY, ETC., ET AL., RESPONDENTS.

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## BRIEF OF RESPONDENTS

—BY—

LEWIS R. BRYAN,
E. B. COLGIN,
*Solicitors for Respondents.*

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C. C. YOUNG PRINTING COMPANY, HOUSTON

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## BRIEF OF RESPONDENTS

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The statement of petitioners is in the main correct, and no necessity exists for repetition of facts already stated. For convenience, respondents will employ the same abbreviations and designating terms as used by petitioners whenever necessary to do so.

As the bond is in part the basis of controversy, it is

deemed proper to set it out in full for the convenience of the court. It is as follows:

"THE STATE OF TEXAS,
"COUNTY OF FORT BEND.
"KNOW ALL MEN BY THESE PRESENTS:

"That we, J. H. P. Davis & Company, Bankers, unincorporated, of Fort Bend County, Texas, as principal, and J. H. P. Davis, T. A. Wessendorff, R. E. L. Wessendorff, E. Foerster, T. B. Wessendorff, T. W. Davis, R. H. Darst, A. P. George, Real F. Ransom and J. W. Slavin, as sureties, are held and firmly bound unto C. D. Myers, County Judge of Fort Bend County, Texas, and to his successors in office, in the penal sum of Three Hundred Thousand and No/100 ($300,000.00) Dollars, for the payment of which well and truly to be made in lawful money of the United States of America, we hereby bind ourselves, our heirs, executors and administrators firmly by these presents, both jointly and severally.

"Signed with our hands, sealed and dated this..... day of February, A. D. 1921.

"The conditions of the foregoing obligation are such that whereas the above bounden principal, J. H. P. Davis & Co., Bankers, Unincorporated, was on the 15th day of February, A. D. 1921, duly and legally chosen by the Commissioners Court of Fort Bend County, Texas, as County Depository for said county for a period of two years, ending sixty (60) days after the time fixed by law for the next selection of a depository, upon its bidding and agreeing to pay to the County of Fort Bend interest on daily balances in said Depository of said County of Fort Bend at the rate of (6%) per cent per annum, said interest payable monthly.

"Now, therefore, if the above bounden principal, J. H. P. Davis & Co., Bankers, Unincorporated, shall faithfully do and perform all the duties and obligations devolving on it by law as the County Depository of Fort Bend County, and shall, upon presentation

pay checks drawn on it by the County Treasurer of Fort Bend County, Texas, shall faithfully keep and account for all funds belonging to the county which are deposited with it, and all other funds deposited with it, and all other funds deposited with it under the requirements of Chapter II, Acts of the Thirty-fifth Legislature passed at its regular session, and shall pay the interest at the time and at the rate hereinabove stipulated; and shall at the expiration of the term for which it has been chosen, turn over to its successor all the funds, property and other things of value coming into its hands as such depository, then and in that event this obligation is to become null and void, otherwise to remain in full force and effect.

"Any suits arising out of or in any way connected with this bond shall be tried in the County of Fort Bend and State of Texas, in any court therein having jurisdiction of the subject-matter.

"In witness of all of which we have hereunto set our hands and the said J. H. P. Davis & Co., Bankers, Unincorporated, has caused these presents to be signed with its name by its president, and attested and sealed with its corporate seal the day and year first above written.

"J. H. P. Davis & Co.,
"By J. H. P. Davis,
"President, as Principal,
"E. Foerster,
"R. E. L. Wessendorff,
"J. H. P. Davis,
"T. A. Wessendorff,
"T. B. Wessendorff,
"T. W. Davis,
"R. H. Darst,
"A. P. George,
"Real F. Ransom,
"J. W. Slavin,
"As Sureties."

The bond for $50,000.00 was substantially and practically of like tenor and effect.

**Argument.**

J. H. P. Davis & Company, which was a large banking institution at Richmond, Texas, was named and designated as a county depository. Accordingly, in February, 1921, the bank executed two bonds, one for the sum of $50,000, and the other for the sum of $300,000, as shown in the next preceding statement. These bonds were executed under the requirement of Chapter 2, Acts of the Thirty-fifth Legislature, and especially Article 2443 of our Revised Statutes, which reads as follows:

> "Within five days after the selection of such depository it shall be the duty of the banking corporation, association or individual banker so selected to execute a bond or bonds, payable to the County Judge and his successors in affice, to be approved by the Commissioners Court of said county, and filed in the office of the County Clerk of said county, with not less than five solvent sureties, who shall own unincumbered real estate in this State not exempt from execution under the laws of this State of as great value as the amount of said bond (or of as great value as the amount of all of said bonds when more than one bond) and said bond or bonds shall in no event be for less than the total amount of revenue of such county for the next preceding year for which the same are made; provided that nothing herein shall prevent the making of such bond or bonds by a surety company or companies, as provided by law, and payable as herein provided. And provided further that the Commissioners Court may accept in lieu of such real estate or surety company surety bonds of the United States, or of the State of Texas,

or of any county, city, town or independent school district in the State, which shall be deposited as the Commissioners Court may direct, the penalty of said bond or bonds not to be less than the total amount of the annual revenue of the county for the years for which said bond or bonds are given, and shall be conditioned for the faithful performance of all the duties and obligations devolving by law upon such depository, and for the payment upon presentation of all checks drawn upon said depository by the County Treasurer of the County, and that said county funds shall be faithfully kept by said depository and accounted for according to law. Any suits arising thereon shall be tried in the county for which such depository is selected."

An examination of the bonds in question discloses that J. H. P. Davis & Company executed these bonds as principal and that all of the individual names recited in said bonds were evidenced by signatures signed as sureties for their principal, J. H. P. Davis & Company; there were ten sureties, among whom were four members constituting the partnership known as J. H. P. Davis & Company. J. H. P. Davis & Company in both of the bonds themselves is designated as the principal and throughout the bonds is shown to be the bounden principal. For instance, the clause; "That, whereas, the above bounden principal, J. H. P. Davis & Company," etc., and again, the clause, "Now, therefore, if the above bounden principal, J. H. P. Davis & Company, shall do and faithfully perform," etc., and again, the clause, "And shall, at the expiration of the term for which it has been chosen, turn over to its successor all of said property and other things of value coming into its hands as such depository," etc. In the closing paragraph it appears that J. H. P.

Davis & Company has caused the presents to be signed with its name and by its president; and none of the individuals who have undertaken to sign as sureties appear to have been bound as principal, or to have been designated as such, either expressly or by any words or implication. On the other hand, the bonds themselves affirmatively show that the individuals who signed same in addition to J. H. P. Davis & Company were purporting to act in the capacity of sureties. This is manifest by the words "as sureties" appearing after the recital of their names in the body of the bonds, as well as after the last signature of the individuals. Conclusively and affirmatively, therefore, these bonds were executed by J. H. P. Davis & Company as principal and by the individuals whose names appear thereon, purporting to act as sureties. A careful analysis of Article 2443 of our Revised Statutes cannot but convince the thinking mind that a well defined policy was therein declared of requiring not less than five solvent sureties, who shall own unencumbered real estate in Texas not exempt from execution under the laws of the State of as great value as the amount of bonds, and that these sureties were in nowise to be halfway sureties, but persons who were not already obligated for the amount desired to be secured. It provides for bonds by surety companies, and the acceptance in lieu of bonds of such real estate of such county, security bonds of the United States, or the State of Texas, or of any county, city, town or independent school district in the State which shall satisfactorily secure the money deposited with the bank. The question, therefore, that presents itself is whether or not the individual members of the firm could become sureties for the partnership to such

an extent as to bind their individual estates by giving priority and preference to the obligee in the bonds over the other general creditors of the partnership.

Prior to the decision or the United States Supreme Court in the case of Francis v. McNeal, reported in 228 U. S. 695, rendered on May 26th, 1913, there were frequent judicial holdings that within the scope of the Bankruptcy Act a partnership was an entity separate and distinct from the members who composed it, and that, therefore, when a partnership was adjudicated a bankrupt, the individual estates of the parties who composed the partnership were not drawn into the administration of bankruptcy. However, the McNeal case by the Supreme Court overthrew all those decisions which announced the erroneous principle mentioned. Mr. Justice Holmes, in delivering the opinion for the court, had occasion to say:

> "But we do not perceive that the clause imports that the partnership could be in bankruptcy and the parties not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for it continuing out. The necessary and natural meaning goes no further than that."

Again he said:

> "Finally it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between the firm and members under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts of use in which the discharge is granted. If, as in the present case, the partnership and individual estates

> together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the Act, is to administer both in bankruptcy."

In other words, this decision has set at rest the false notion that there was any distinction between the partnership and the members who composed it. In our State, common law rules in respect to partnerships have been abolished, and contracts of partnership are joint as to all of the partners and several as to each of them. So that it is not necessary in this State for a creditor of the partnership to sue the partnership in order to hold any individual members personally liable on the indebtedness. A creditor of the firm may sue all of the partners, or may sue just one of the partners in his individual capacity, and in the latter case without proceeding at all against the partnership. This was the specific holding in Fowler Commission Company v. Charles Land & Company, decided by the Commission of Appeals and approved by the Supreme Corut, 248 S. W. 314.

It follows, therefore, that in Texas, where this contract was made, with all of its laws which apply thereto becoming part of it, there can be no distinction, whether in bankruptcy or otherwise, between an individual member of the partnership and the partnership itself. The conclusion, therefore, which is reached, is that inasmuch as every individual member of the partnership becomes bound, jointly and severally, when J. H. P. Davis & Company signed the bond in question as principal, it would be a legal absurdity to hold that the members of the partnership could become sureties for the partnership and thereby surety for themselves. It seems to us that

we are reinforced in the conclusion thus reached when it is considered that under our substantive law a member of the partnership may not become a surety for the partnership, for while the question was not directly decided, it is significant that in Bank v. Cupp & Company, 59 Tex. 268, it was held that a stockholder of a corporation could sign an attachment bond as surety thereon *because he was not a partner,* and the corporation was a distinct entity from the stockholders. The clear implication is that if it had been a partnership the holding of the court would have been otherwise. To the same effect is the case of Laning v. Iron City Nat'l Bank, 36 S. W. 431.

Another serious objection to the members of the partnership becoming sureties for the firm lies peculiarly in the fact that Article 2443 of our Revised Statutes requires that this bond shall be signed with not less than five solvent sureties who shall own unencumbered real estate. Certainly it would be against a plain public policy to accept the individual members of a partnership on the bond of the firm under this article, even though and notwithstanding that the individual members possess separate or individual estates and unencumbered lands in addition to the holdings in a partnership. The members of the partnership are already obligated severally as absolutely and with as much far-reaching effect by the execution of the bond by J. H. P. Davis & Company as though they had each signed their individual names as partners. Of what avail then can it be to obtain as sureties members of the firm who are already individually and severally bound on the obligation? They are bound severally so absolutely and to such an extent that the County of Fort Bend could have proceeded to sue any one of these

partnership members individually or severally without suing the partnership. It seems to follow logically that when the individual members of the partnership of J. H. P. Davis & Company signed their names on this bond as sureties they added no strength or credit to it, and gave it no value, and their names or signatures to all intents and purposes should be considered as mere surplusage.

But be that as it may, the general intendment of the Bankruptcy Act of 1898 as expressed in clear and unambiguous language is to only allow a proof of such debts against the individual estate of the member of the partnership as in fact constitute separate and independent obligations as contradistinguished from obligations of the partnership. For certainly if Congress had intended that the words *individual debts* should mean and include obligations created by indorsement, suretyship or guaranty, it would have so declared in unmistakable language. To give to these words a meaning different from that which was given by the Fifth Circuit Court of Appeals in the instant case would be to defeat the very purpose of an equitable distribution of the property of the bankrupts among their creditors. For the primary object of the Bankruptcy Act is to secure a just distribution of the bankrupt's property among his creditors, and it may be said that the secondary object is the release of the bankrupt from the obligation to pay the debts of creditors. This was so stated of the Act of 1867 in Wilson v. City Bank of St. Paul, 17 Wall. 473, 21 U. S. (L. Ed.) 723. And of the present Act it was again reiterated by this court in Traer v. Clews, 115 U. S. 528, that its object was to secure equitable distribution among the creditors.

Courts should strive to give to statutes that construe-

tion which carries into effect the true intent and object of Congress in its enactment. Minor v. Mechanics Bank, 1 Pet. 64, 7 U. S. (L. Ed.) 47. Again, courts will be slow in adopting a construction which would result in great hardship to creditors with highly meritorious claims. Clarke v. Rogers, 228 U. S. 534.

Nothing but a forced and strained construction of the section in question will enable double proof under the facts of this case. The ordinary meaning of individual debts is in fact such debts for which the individual is made primarily responsible consisting of independent undertakings and obligations. Such as are contracted in his own business or in transactions which are individual in character. Or where, under the substantive law of a state, an individual is allowed to create an obligation against his individual estate in a partnership transaction.

The so-called American rule allowing double proof is an artificial offshoot born of a technical analysis of the old equity rule of marshaling of assets. Its effect is the unjust enrichment at the expense of the partnership creditor. A sound public policy and the general polity of equity jurisprudence, so to speak, should not contemplate the unjust enrichment of one creditor at the expense of another. Congress never had in mind that the doctrine of super-added security resulting in double proof where there is a partnership transaction should ever exist or be applied by the courts of bankruptcy. The so-called American rule is too technical, artificial and unjust to find favor in a court of equity. As was substantially and in effect said in the case of Swartz v. Siegel, 117 Fed. 13: "Where language is plain and unambiguous it should be given its ordinary meaning." Individual debts

are such debts as are contracted by the individual in his own business, and which are in nowise related to a partnership transaction. The statutes of fraud speak of standing good for the *debts, default or miscarriage of another.* "Individual debts" ordinarily interpreted would signify not the debts of another, but that of the individual contracting them. The section in question is plain and unambiguous, and should be given its ordinary meaning. Again, courts will at all times adopt that construction which tends to pro-rate equity and equality in the distribution of the bankrupt's estate among his creditors.

In Re: Faulkshire, 153 Fed. 503.
In Re: Adams v. Hoyt Company, 164 Fed. 489.

Congress never even indirectly intended to allow double proof under the facts presented herein, but only where there was both a partnership obligation and an individual undertaking, not based on a partnership transaction.

Respondents will now attempt briefly to answer seriatim the propositions submitted by petitioners.

**First Counter-Proposition.**

**There is no merit to any of the propositions submitted by petitioners because the decision of the Circuit Court of Appeals for the Fifth Circuit properly determined the rights of the parties to a non-negotiable contract, an indemnity bond wholly the creature of the statutory law of the State of Texas, in accordance with the law of the State of Texas.**

**Authorities.**

Vernon's Sayles' Civil Statutes 1914, Art. 2443.
Revised Statutes of the State of Texas, 1925, Art. 2547.

The foregoing statute provides as follows:

"Within five days after the selection of such depository it shall be the duty of the banking corporation, association or individual banker so selected to execute a bond or bonds, payable to the County Judge and his successors in office, to be approved by the Commissioners Court and Comptroller and filed in the office of the Clerk of said county, with not less than five solvent sureties, who shall own unincumbered real estate in this State not exempt from execution under the laws of this State of as great value as the amount of said bond, or of as great value as the amount of all of said bonds when more than one bond; and said bond or bonds shall in no event be for less than the total amount of revenue of such county for the next preceding year for which the same are made. Nothing herein shall prevent the making of such bond or bonds by a surety company or companies, as provided by law, and payable as herein provided. The Commissioners Court may accept in lieu of such real estate or surety company, security bonds of the United States, or of this State or of any county, city, town or independent school district in the State, which shall be deposited as the Commissioners Court may direct, the penalty of said bond or bonds not to be less than the total amount of the annual revenue of the county for the years for which said bond or bonds are given, and shall be conditioned for the faithful performance of all the duties and obligations devolving by law upon such depository, and for the payment upon presentation of all checks drawn upon said depositary by the County Treasurer of the County, and that said county funds

> shall be faithfully kept by said depository and accounted for according to law. Any suits arising thereon shall be tried in the county for which such depository is selected."

This court in Meyers v. International Trust Company, 273 U. S. 382, opinion by Mr. Justice Sandford, had occasion to determine whether an indorsement by a partner on the note of a partnership in Massachusetts created an individual liability. The conclusion reached was that it did, because it was settled under the law of Massachusetts that a partner who indorses a firm note as an individual incurs—in addition to the liability for partnership debts arising from his membership in the firm—a distinct and separate liability. Probably this application of the substantive law of Massachusetts by this court will explain the authorities cited by the petitioners as being in conflict with the decision of the Fifth Circuit Court of Appeals. Most States have adopted the Uniform Negotiable Instruments Law. Under it, as well as under the old Law Merchant, a partner who becomes a surety on a partnership note creates a separate and distinct obligation from that as partner, because this character of paper is intended to pass in channels of commerce without question to facilitate trade, and no person taking such paper in payment for goods, perhaps far distant from the place of its origin or the residence of its maker and indorser, should be required to ascertain whether the indorsement gives it any added security. This is forcibly expressed in Daniel on Negotiable Instruments, Section 303, where it is said:

> "No party can be charged as principal upon a negotiable instrument unless his name is thereon disclosed.

> The reason of this rule is that each party who takes a negotiable instrument makes his contracts with the parties who appear on its face to be bound for its payment; it is 'courier without luggage,' whose countenance is its passport; and in suits upon negotiable instruments, no evidence is admissible to charge any person as a principal party thereto unless his name in some way is disclosed upon the instrument itself; although upon other written contracts, not negotiable, it is often competent to show that, although signed in the name of the agent only, they were executed in the business of the principal, and with the intent that he should be bound. And in such cases he is bound upon them accordingly."

Again, it was said in the case of Fourth National Bank v. Mead, 216 Mass. 521, 104 N. E. 377, that a member of a partnership placing his name on the back of a firm note "is a person not otherwise a party" to the instrument within the meaning of the Negotiable Instruments Act, and will make him liable as indorser.

In Bayne et al. v. Cusimano, 23 So. 361, the Supreme Court of Louisiana decided:

> "Mr. Bayne then is the principal in the attachment obligation. He is bound on the bond in that character. How could he be both principal and surety at one and the same time in the same obligation and for the same liability?"

Again, in Nashville Saddlery Company v. Green, 89 So. 816, the court, in speaking of a member indorsing a partnership note, said:

> "That a person may be a surety on his own note is not conceivable."

In 30 Cyc. 455, we read:

> "The law merchant adopted the civil law conception

> of a firm as a legal entity, and permitted the indorsement of negotiable paper which was made by a firm to a partner or by a partner to his firm with the same effect as though the parties to the paper were strangers."

Hence it is clear that the decisions giving the holder of negotiable notes executed by a partnership and indorsed by the individual members of the firm the right to double proof are not in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in this case, since this suit involves a statutory bond on which the partners could not obligate themselves individually in contradistinction from their individual or several liability as partners thereon as principals. This is the rule in Texas, and that rule is a part of the bond. The Commission of Appeals of Texas, on March 9th, 1921, in a decision styled Trinity Portland Cement Company v. Lion Bonding & Surety Company, 229 S. W. 483, which decision was adopted and entered by the Supreme Court of the State of Texas as its judgment, held:

> "The principles and rules of law applicable to the construction of contracts are so elementary and so familiar to the profession that it is unnecessary to set them forth. It is sufficient to say that all parties in anywise connected with the contract were presumed to know the law, and that the instruments above quoted from must be construed together, and be construed also in connection with the statute above cited, which by conclusive implication of law was written into the contract and became as much a part of the bond as though it were expressed therein, and the bond must be read and understood in the light of it."

**Second Counter-Proposition.**

**There is no merit to any of the propositions submitted**

**by petitioners, because the substantive law of the State of Texas, where the contract (bond) was executed and was to be performed, determined whether the members of the co-partnrship of J. H. P. Davis & Company could become sureties on the foregoing statutory bond, and whether by attempting to sign as sureties on the foregoing statutory bond they created any individual obligation in favor of Fort Bend County, and the sureties on said bond who were not members of the firm in contradistinction from their individual obligations as members of the co-partnership of J. H. P. Davis & Company.**

**Authorities.**

Samuel A. Meyers v. International Trust Co., 273 U. S. 372.

Trinity Portland Cement Co. v. Lion Bonding & Surety Company, 229 S. W. 483.

Fowler Commission Co. v. Chas. Land & Company, 248 S. W. 314.

In the Fowler case, cited *supra*, the court said:

> "In this State, common law rules have been abolished, and the contracts of partnership are joint as to all of the partners and several as to each of them. A holder of a claim against a partnership may proceed against any of the partners individually, and it is not necessary to join either of the other partners or the partnership. As between the partners, equity may require a marshaling of joint assets in payment of joint liabilities, or require contribution from one member to another, where a partner has been required individually to pay a partnership debt, but this does not limit the right of creditors to select any individual of the firm and collect their claims wholly from his individual property."

The foregoing is the latest expression of the Supreme

Court of Texas as to the legal status of the partnership and the individual partners, and reaffirms what has been the rule in Texas for an indefinite period in the past.

**Third Counter-Proposition.**

**There is no merit to any of the propositions submitted by petitioners, because under the substantive law of the State of Texas the members of the co-partnership of J. H. P. Davis & Company were jointly and severally liable to the creditors of the firm, and they could not make themselves individually liable in contradistinction from their individual liability as such members of the firm by attempting to become sureties on their co-partnership bond, the debt created by the bond being exclusively for the benefit of the partnership.**

**Authorities.**

Vernon's Sayles' Civil Statutes, 1914, Art. 6147.
Revised Statutes of Texas, 1925, Art. 6111.
Fowler Commission Co. v. Charles Land & Co., 248 S. W. 314.
Bank v. Cup & Company, 59 Tex. 268.
Laning v. Bank, 36 S. W. 431.

**Fourth Counter-Proposition.**

**There is no merit to any of the propositions submitted by petitioners, because the assets of the partnership and assets of the individual partners having been drawn into the administration of the bankruptcy court, the Circuit Court of Appeals for the Fifth Circuit, in refusing to allow the claim of Fort Bend County and the sureties on the depository bond who were not members of the partnership to be approved for the full amount of $334,136.24 against both the partnership estate of J. H. P. Davis &**

**Company and the individual estates of the partners, correctly prevented, under Section 5, Subdivision (g), of the Bankruptcy Act, Fort Bend County, and the said sureties from getting in every equitable sense an inequitable preference, and has thereby secured to all creditors an "equitable distribution of the property of the several estates" as intended by said section of the Bankruptcy Act.**

**Authorities.**

Section 5, Subdivision (g), Bankruptcy Act.
Fort Pitt Coal & Coke Co. v. Diser et al., 239 Fed. 443.
Schall v. Camors, 251 U. S. 239.

It seems that Section 5, Subdivision (g), of the Bankruptcy Act, gives the court power to

> "marshal the assets of the partnership estate and individual estates so as to prevent preference and secure the equitable distribution of the property of the several estates"

before it becomes the duty of the court to carry out the provisions of Section 5, Subdivision (f), of the Bankruptcy Act. In this case the Circuit Court of Appeals for the Fifth Circuit might have based its decision upon its power to secure the equitable distribution of the property of the several estates given by Subdivision (g) of Section 5 of the Bankruptcy Act, as was done by the Circuit Court of Appeals for the Sixth Circuit in Fort Pitt Coal & Coke Company v. Diser et al., 239 Fed. 443, in which Greer Brothers, a co-partnership composed of John L. Greer and Robert C. Greer, was indebted to the Fort Pitt Coal & Coke Company, and on December 31st, 1914, executed a note payable to the Fort Pitt Coal &

Coke Company for $4000 and a note for $373.30, each of which notes was given to cover the indebtedness owing by the partnership, and each of which notes was indorsed by John L. and Robert C. Greer, and the $4000 note was secured by a chattel mortgage upon personal property of the firm and of the individual partners. Judgment was obtained on the note for $373.30 against the partnership and the partners individually. In March of 1915 the partnership was adjudicated a bankrupt, and the estates of the individual partners were drawn into the bankruptcy court for administration, though the individual partners were not adjudicated bankrupts. The bankruptcy court held that technical preferences had been given to the Fort Pitt Coal & Coke Company, and disallowed the claim against the individual estates. The case was appealed to the Circuit Court of Appeals for the Sixth Circuti, where it was held, among other things:

> "Further, if we were in error in treating the acts of these two partners as preferences and as a wrongful appropriation of assets equitably belonging to the partnership creditors to the use of a single creditor of that class, it cannot escape attention that the practical effect of the acts of these partners, as well as the partnership, been adjudged bankrupt, in which case their acts would unquestionably have been open to a charge of technical preference; and in view of the facts already shown that the adjudication actually made resulted in drawing these individual assets into the jurisdiction and administration of the bankruptcy court, and since in every equitable sense these acts were the equivalents of technical preferences, the court itself might well set them aside in virtue of its power under Section 5g to 'marshal the assets of the partnership estate and the individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates'."

The reason for giving partnership creditors preference in the distribution of partnership assets is that the law presumes that the partnership obligation was incurred to increase partnership property, and that separate liability was incurred to enhance the property of the individual partners. And this principle was one, among others, on which this court based its decision in the case of William Schall et al. v. Frederic Camors et al., 251 U. S. 239-254, for it was said by Mr. Justice Pitney:

> "It is insisted by petitioners, further, that because the proofs of the individual claims establish the responsibility of each partner for the frauds, they are liable *in solido* not only as partners, but individually; and that, irrespective of whether the claims are provable in tort for the fraud, they are provable, and were properly proved both against the individual partners and against the firm as claims in quasi contract or equitable debt. But as the basis of liability of this character is the unjust enrichment of the debtor, and as the facts show that no benefit accrued to the individuals as a result of the frauds beyond that which accrued to the firm, the logical result of the argument is that out of one enrichment there may arise three separate and independent indebtednesses. Doubtless it would be conceded that a single satisfaction would discharge all of the claims; but we are dealing with a situation where, by reason of insolvency, it is not to be presumed that claims will be satisfied in full; and, as already pointed out, the effect of sustaining the right to double proof would be to give petitioners not only a right to share in the partnership assets on equal terms with other partnership creditors, but a participation in the individual assets on equal terms with other individual creditors and in preference to other partnership creditors. Section 5 of the Bankruptcy Act (30 Stat. at L. 547, 548, Chap. 541, Comp. Stat., Sec. 9589, 1 Fed.

Stat. Anno. 2d. p. 578) establishes on a firm basis the respective equities of the individual and firm creditors. Hence the distinction between individual and firm debts is a matter of substance, and must depend upon the essential character of the transactions out of which they arise. And since, in this case, the tort was done in the course of the partnership business, for the benefit of the firm, and without benefit to the partners as individuals, no legal or equitable claim as against the individuals that might be deemed to arise out of it, by waiver of the tort or otherwise, can displace the equities of other creditors, recognized in the Bankruptcy Act, and put petitioners in a position of equality with others who actually were creditors of the individual partners, and of preference over other firm creditors."

**Fifth Counter-Proposition.**

**There is no merit to any of the propositions submitted by petitioners, because under the present Bankruptcy Act double proof is allowable only where a creditor holds two distinct obligations, (a) the obligation of the firm as such, and (b) the obligation of the individual not linked with the partnership transactions, and therefore independent in character.**

**Authorities.**

Section 5, sub F and G of the Bankruptcy Act.

The above counter-proposition is sustained by the following cases:

J. W. Hampel et al., Trustees in Bankruptcy, v. C. Minkwitz, as Treasurer of Fort Bend County (see Tr. p. 70), which in clear and logical exposition of thought announced the broad and equitable rule that double proof was not allowable if the guaranty, suretyship

or indorsement relates to a transaction of the partnership of which the individual, undertaking to bind himself, was a member.

In LaMoylle County National Bank v. Stevens (1901), 107 Fed. 245, Judge Wheeler said in part:

> "The question here is whether these debts, if any, were at the time of the adjudication as between the individual and the firm, the joint debts of the individual or the joint debts of the firm, and not whether the individuals were in any way liable for the debts. As to the first note, the claim is sought to be made individual through the separate indorsement of C. P. Stevens. But it was primarily a partnership note, and so far as in anywise made to appear a partnership debt; and if Stevens' liability as indorser had been fixed, it would still be apparently a partnership debt."

In this case the other note was signed individually on the back, and it was attempted to hold the signer as a co-maker, but the court decided that the evidence rebutted this theory and predicated the decision on the ground that it was a partnership debt, and that, therefore, double proof was not allowable.

In re Mosier (D. C. O.), 112 Fed. 138:

> "The joint and several notes given by the parties for partnership liabilities are none the less partnership debts, because the partners are also individually liable. By the terms of the same section of the bankruptcy act, no part of the separate property is to go for partnership debts until all separate debts are fully paid. Therefore, there can be no individual assets of Mosier in which these partnership creditors can be entitled to participate."

Again, in the case of in re C. H. Kendrick & Company,

226 Fed. 978, it was announced that where the individu
members of the partnership contracted a partnership de
it constituted no justification to allow proof against t
individual estate of the firm.

In 3 R. C. L. 214:

> "And the general result of the bankruptcy cases
> the United States is that while they cannot be said
> deny the right to make double proof of a mere joi
> and several obligation, they have not allowed
> course to both estates, except where the double clai
> was based upon this joint obligation of a firm, a
> also an independent obligation of the individu
> partner."

At most, the apparently adverse decisions cited by p
titioners even with reference to the binding of the se
arate estates for individual acts in reference to a pa
nership obligation is grounded upon the most flimsy fi
tion and implication of security that it is conceivable
express. In our humble opinion the weight of reaso
if not the weight of decision, is with the authorities whi
hold that the true test is whether or not it was a pa
nership obligation or an individual obligation. Howeve
waving aside the question of soundness and satisfacto
accountability for these seemingly adverse authorities,
is indeed noteworthy that in the line of decisions whi
bind the individual members of a firm for the payme
of a partnership obligation, the partner has invariab
and without exception become an indorser or surety f
the firm on a negotiable instrument, or that he has act
individually as a principal and co-maker in stated ter
and expressed language on a promissory note. It is el
mentary that if an individual should sign in his own nam
a contract not negotiable in character, the payee cou

hold him at his election individually or could sue the undisclosed principal, if he in fact had acted for payor. To illustrate this exception: If John Smith should sign as maker a promissory note for some third person, the latter could not be liable on the note. Texas L. & C. Co. v. Carroll & Iler, 63 Tex. 51; Sanger v. Warren, 91 Tex. 482; Metcalf v. Williams, 104 U. S. 98.

In the Carroll case, 63 Tex. 51, cited *supra*, the court, in the course of its opinion, held as follows:

> "The general rule is that an agent should execute a contract in the name of his principal, and in reference to negotiable instruments it is well settled that no one can be charged thereon unless his name appears as a party to the paper in some relation. Daniels on Neg. Inst. 303.
>
> "This rule, however, in reference to negotiable paper, arises from the nature of such paper, and the uses for which it is intended.
>
> "Such paper is expected and intended, if it be necessary or convenient for the holder to do so, to be transferred and to pass into the hands of various persons, and for the security of all who may deal with it, it is necessary that it should show upon its face the liability of every person who is bound for its payment; for it is upon what appears from the paper to be the true relation of persons to it that successive holders contract.
>
> "In relation, however, to paper not by the law merchant deemed negotiable this rule does not prevail, and upon 'written contracts not negotiable it is often competent to show that, although signed in the name of the agent only, they were executed in the business of the principal, and with the intent that, although signed in the name of the agent only, they were executed in the business of the principal, and with the intent that he should be bound. And in such cases he is bound upon them accordingly.' Daniel on Neg.

> Inst., 305; Lerned v. Johns, 9 Allen, 419; Brown v. Parker, 7 Allen (Mass.) 339; Huntington v. Knox, 7 Cush. 373; Slawson v. Loring, 5 Allen 342; Railroad Co. v. Benedict, 5 Gray 561; Green v. Skeel, 2 Hun. 487."

Our Supreme Court again, in the case of Sanger v. Warren, 91 Texas 482, announced the same rule. It said:

> "It is well settled that the rule (holding liable the undisclosed principal) never had any application to negotiable instruments, no one being chargeable thereon 'unless his name appears as a party to the paper in some relation.' Authorities above cited."

Some of the courts relax this rule when an individual partner signs a note which is in reality for the partnership, as in that instance, on the principle that a partner can bind the firm and not on the doctrine of undisclosed principal, the partnership is liable. Burns v. Parish, 3 B. Mon. (Ky.) 8; McKee v. Hamilton, 33 Ohio St. 7; Weaver v. Tapscott, 9 Leigh (Va.) 424. In such case the maker is liable as a partner, but the distinction applied remains unchanged.

Respondents submit their independent proposition on the question of contribution to be considered by the court only in the event it is held that double proof is allowable under the facts of this case.

**Independent Proposition.**

**A member of a partnership firm who has signed a statutory county depository bond as surety for the partnership, insofar as his separate individual estate is concerned, is on an equal footing and terms with the other sureties who are not members of the partnership, in reference to the payment of any loss sustained by the**

**obligee under the bond. This is essentially true, if in his individual capacity as surety and for the purpose of giving additional security to the obligation he can bind his separate estate, since, if he is to be a distinct entity individually in this respect in order to give additional security to the creditor, he is likewise to be considered a distinct entity from the partnership in his relation with his co-sureties, and is accordingly entitled to invoke the doctrine of contribution.**

**Authorities.**

The theory on which opposing counsel seeks to escape from the doctrine of equitable contribution appears to be on the legal proposition that contribution arises only between parties whose situations are equal. Generally speaking, this is a correct exposition of the law, but in order to arrive at the conclusions which create an inequality of situations, the claimants must shift or reverse the view originally taken, viz, that a member of a partnership, while already jointly and individually liable for a partnership indebtedness, can nevertheless give a super-added security by signing in his individual capacity. This in effect, for the purpose of super-added security, would constitute a member of the partnership insofar as relates to his separate estate a distinct entity from the partnership itself. If he is to be regarded as a distinct entity from the firm of which he is a member, for the purpose of giving super-added security, and binding his separate estate, then in justice and by way of consistency he should be treated as a distinct entity from the firm when the question of equitable contribution arises as among the co-sureties for a loss sustained on a bond given by the partnership. It is true that when the partnership exe-

cuted the bond that each individual partner is charged with a direct and primary liability for the loss which may be sustained thereunder. This it is that renders it difficult for the thinking mind to understand how the partner may become a surety for the partnership. He can give it no greater security, nor make himself one bit more liable than he was by the signing of the bond on the part of the partnership. But, if the decisions which attempt to clothe the partner with a different entity when he contracts in his individual capacity in matters solely pertaining to the business of the partnership does in fact give the so-called super-added security against his separate estate, then it would but seem the natural presumption and inference of reason that since he is considered a different person while acting in the capacity of a surety for the principal, he should likewise be considered a different person when the question of equitable contribution crops out of the loss sustained by the obligee in the bond. We cannot start out our story in prehistoric dawn and bring into play the use of firearms and set our scene in this day of modern civilization. There can be no anachronism. The allegory must likewise be consistent. And if this is true in fiction, how much more true should it be when the human mind is employed to adjust the differences of litigants according to principles conceived and practiced by the mind trained in law. If the legal mind creates a fiction in order to arrive at a given conclusion, should it not be consistent enough to use the fiction throughout all related matters? The only manner in which the partner can be held to have become liable is on the theory of distinct entity, and therefore super-added security; should petitioner not be consistent enough to use the fiction

which has thus been reared to create distinct entities where none existed before. And most certainly once this fiction has been created and the distinct entity of character made to appear on the legal stage, it cannot be discarded without doing violence to both reason and justice.

In 6 R. C. L. 1036 it is said:

> "2. *Nature and Basis of Doctrine.*—It is a familiar principle that, when several parties are equally liable for the same debt, and one is compelled to pay the whole of it, he may have a contribution against the others to obtain from them the payment of their respective shares. It is almost universally conceded that this doctrine is not founded on contract, but on an acknowledged principle of equity, which requires that those who voluntarily assume a common burden should bear in equal proportions. And when any burden ought from the relation of the parties, or in respect of property held by them, to be equally borne, and each party is *in aequali jure*, contribution is due. But it is essential to the application of the principle that the party claiming contribution be *in aequali jure;* if his obligation is primary and that of the defendant secondary only, he cannot have contribution. Contribution presumes the payment and extinguishment of the debt by one for the benefit of all, and it has been held that the whole debt must have been paid before the action for contribution could be maintained, though the contrary doctrine has also been laid down. If, however, the party making payment pays no more than his proportion, he cannot recover contribution, even though his co-debtor has paid nothing."

It will be observed the principle is declared to be also:

> "If his obligation is primary and that of the defendant secondary only, he cannot have contribution."

This declaration of principle is sustained by only one cited authority. Thweatt v. Jones, 1 Rand. (Va.) 328; 10 Am. Dec. 538. An examination of that decision will show that it does not sustain the stated principle. In fact, the case turns upon the following proposition:

> "Where parties are equally bound to bear a burden and are *in aequali jure*, that is, liable from the circumstance existing as to both, contribution is due of right in equity; that this general proposition is liable to one exception; viz: that the parties would otherwise be entitled to such contribution, forfeit such right if the joint liability arose from an act *malum iso se* that failed of voluntary tort, in which he participated; that when it is shown that the parties were originally equally bound, and stood *in aequali jure*, the party who has paid same is entitled, of course, to contribution, unless it be shown on the other side that his right has been forfeited as aforesaid, by his own wrongdoing."

The equality of position which appears to be the prop of the equitable principle is no doubt represented by the common liability of the sureties, or other parties.

The case of Robertson v. Boyd, 60 Ohio St. 57, 53 N. E. 495, laid down the true test when it said:

> "It is not fixed on contract, but arises from the consideration that persons subject to a common duty or debt should contribute equally to the discharge of the duty or debt. * * * The right does not depend upon the order in which each party became liable. The common liability is the crucial test. On the prisage of wine it is immaterial whose wines have been taken. All must contribute equally. So it is when goods are thrown overboard for the safety of a ship; all owners of the goods saved by the act must contribute proportionately to the loss."

But if we should concede for the purpose of the argument that the rule does not apply where one is primarily liable in consequence of an existing relation, and the others not, then it might be urged with logical force that the equitable principle of contribution is of broader scope and comprehension; so that when the act of the one who was already directly and primarilyy liable, created a separate and distinct contract or surety which in its legal effect rendered secondary and subordinate the original direct and primary liability, there should be no sufficient reason in equity why the application of the doctrine should not apply. For while it is true that when J. H. P. Davis & Company signed as principal, each partner became directly and primarily liable, yet if a partner can become a surety for the firm and give priority to the obligee in the bond, which he signed in his individual capacity, over the general creditors, as between the sureties, the principal, the partnership and the individual members thereof, the direct and primary liability created by the act of the partnership in signing as principal has been destroyed to the extent of giving preference to the obligee in the bond of exhausting the separate estates of the individual members of the partnership for the satisfaction of its claim, and therefore rendering secondary this original liability to the subsequent act of suretyship. Keeping in mind the theory of distinct entities, all of these sureties were on a footing of equality and were liable for the common loss sustained by the obligee in the bond, so that the obligee in the bond had a common right to exhaust the individual estates equally and without hindrence for the payment of its claims. The individual estates of all of the sureties, members as well as non-members of the part-

nership, were bound and obligated by a common principle of liability for the payment of the claims; and how then can it be said with good reason or with any degree of satisfaction that they were not sureties *in aequali jure?*

**Conclusion.**

WHEREFORE, it is most respectfully prayed that the judgment of the Circuit Court of Appeals be in all things affirmed, and in the alternative, that the sureties who were partnership members of the firm in question be allowed contribution under appropriate relief from this court, and for such other relief as to this Most Honorable Court may be deemed necessary or proper.

LEWIS R. BRYAN,
E. B. COLGIN,
*Solicitors for Respondents.*

**Specification of Error.**

A member of a partnership firm who has signed a statutory county depository bond, as surety for the partnership, insofar as his separate individual estate is concerned, is on an equal footing and terms with the other sureties who are not members of the partnership, in reference to the payment of any loss sustained by the obligee under the bond. This is essentially true, if in his individual capacity as surety and for the purpose of giving additional security to the obligation he can bind his separate estate since, if he is to be a distinct entity individually in this respect in order to give additional security to the creditor, he is likewise to be considered a distinct entity from the partnership in his relation with his co-sureties. (This is relied on and submitted only conditionally in the event double proof is allowable.)

## ADDENDA

**Brief Statement Under Independent Proposition, Pages 26-27.**

The sureties on bonds involved, not members of the partnership, paid $108,000.00 to Fort Bend County in consequence of loss on bonds. (R. p. 34.)

The Referee in Bankruptcy allowed claim of Fort Bend County for full amount without taking into account credit of $108,000.00 paid by sureties on bonds involved, not members of the partnership (R. p. 56); and this was affirmed by the United States District Court. (R. p. 63.)

This statement was inadvertently omitted and is here inserted under the contention payments should be taken into account under principle contribution.